

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP879-CR

Cir. Ct. No. 2015CF185

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN K. SCHWAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Jefferson County: J. MAC DAVIS, Reserve Judge and RANDY R. KOSCHNICK, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Stephen Schwan appeals a criminal judgment and an order denying his motion for sentence modification.¹ Schwan contends that the circuit court sentenced him based upon improper factors and/or inaccurate information. For the reasons discussed below, we reject Schwan’s challenges to his sentence and affirm.

BACKGROUND

¶2 Schwan entered a guilty plea to a single count of possession of child pornography after police discovered on his computer a single image depicting two naked prepubescent girls. The parties made a joint recommendation for the three-year mandatory minimum amount of initial incarceration, but argued as to the appropriate length of extended supervision. The State asked for two years, while Schwan requested nine months.

¶3 In support of the State’s recommendation for a longer period of extended supervision, the prosecutor discussed Schwan’s criminal history, which included five convictions for operating a motor vehicle under the influence of an intoxicant (OWI). During her comments, the prosecutor misstated to the circuit court that, at the time Schwan committed the offense in this case, he was on extended supervision in a prior hit-and-run case, when Schwan had actually been on probation in the hit-and-run case. The prosecutor also made contradictory statements about whether Schwan had been revoked on the hit-and-run case, at one point stating that Schwan had not been revoked on that case, but at another

¹ The Honorable J. Mac Davis presided over Schwan’s plea and sentencing, and postconviction motion hearings. The Honorable Randy J. Koschnick denied Schwan’s motion for postconviction relief.

point stating that Schwan's terms of extended supervision had been revoked both in the hit-and-run case and in a previous OWI-5th case, when in actuality it was a term of probation in the OWI-5th case that had been revoked.

¶4 The circuit court noted that possession of child pornography is always serious in that it is categorized as a Class D felony, but deemed Schwan's conduct of possessing a single picture to be "about as minimum as it might be" within the potential range of seriousness of the offense. Still, the court noted that by being a consumer, Schwan was supporting an industry that is very damaging to children.

¶5 In addition to a need to protect the public from child pornographers, the circuit court identified another goal of sentencing in this case as a need to protect the public from any harm Schwan might cause from behavior stemming from alcohol abuse. The court acknowledged that it had no information about anything "particularly recent," but observed that Schwan's five OWI convictions suggested that alcohol abuse "will always be a character and rehabilitative issue" for Schwan.

¶6 The circuit court then sentenced Schwan to three years of initial incarceration and two years of extended supervision. As to the length of the extended supervision, the court stated: "the prior alcohol [related offense] record is a good reason to do that, as well as the offense of conviction here." The court then expressed some confusion as to "what happened with [Schwan's] ES on the hit and run," noting that "[i]t sounds like potentially he could be revoked and have to serve time on another one." Taking into account that Schwan both could be revoked and might already be serving a revocation sentence, the court stated that the current sentence would be concurrent.

STANDARD OF REVIEW

¶7 We afford discretionary sentence determinations a strong presumption of reasonableness because the circuit court is in the best position to evaluate the relevant factors and the demeanor of the defendant. *State v. Klubertanz*, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116. In order to demonstrate a misuse of sentencing discretion, a defendant generally must show that the record contains an unreasonable or unjustifiable basis for the circuit court’s action. See *State v. Schreiber*, 2002 WI App 75, ¶9, 251 Wis. 2d 690, 642 N.W.2d 621.

¶8 We will independently review the constitutional question whether a defendant has been denied due process by being sentenced on inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. However, we will defer to any credibility determination or factual findings underlying the circuit court’s decision on a constitutional issue. See *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (the circuit court is the “ultimate arbiter” for credibility determinations when acting as a fact-finder, and we will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony (quoted source omitted)); *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983) (we will not set aside a fact found by the circuit court unless the record shows it to be clearly erroneous—meaning that after accepting all credibility determinations made and reasonable inferences drawn by the fact-finder, the great weight and preponderance of the evidence support a contrary finding).

DISCUSSION

Exercise of Discretion

¶9 When imposing a sentence, the circuit court should discuss relevant factors such as the severity of the offense and the character of the offender and relate them to identified sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court may decide what weight to give each factor in a particular case. *Schreiber*, 251 Wis. 2d 690, ¶8.

¶10 Schwan argues that the circuit court erroneously exercised its discretion here by relying on his past history of alcohol abuse as the basis for the length of the extended supervision. In particular, Schwan asserts that his alcohol consumption “had absolutely nothing to do with this case,” and that there is nothing in the record to explain how “imposing additional extended supervision because of [Schwan’s] past problems with alcohol would in any way punish him for his participation in this crime or, in fact, serve any other sentencing objective associated with this crime.”

¶11 We first note that it is plain from the circuit court’s comments that its goals in imposing a longer term of extended supervision were to protect the public and to address Schwan’s ongoing rehabilitative needs, not to punish him further for the conduct in this case. It was entirely appropriate for the court to infer from Schwan’s history of repeated OWI offenses that he had a long standing problem with alcohol abuse, and to take that history into account when fashioning the sentence in this case, even though the present offense was not alcohol-related.

The fact that Schwan's last OWI had been about seven years earlier goes to what weight to give the factor, which was within the circuit court's discretion.

Due Process

¶12 A defendant has a due process right to be sentenced based upon accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶9. If a defendant can establish by clear and convincing evidence both that inaccurate information was presented at sentencing and that the circuit court relied upon the misinformation in reaching its determination, the burden shifts to the State to show that the error was harmless. *Id.*, ¶26.

¶13 Schwan argues that the State's misstatement that Schwan had a term of extended supervision imposed on his hit-and-run case, and the further suggestion that it was revoked, were not merely inaccurate in and of themselves, but also falsely implied that the hit-and-run charge was a felony on which a bifurcated sentence could have been imposed, when in fact it was only a misdemeanor charge. We agree that the information provided to the circuit court was inaccurate.

¶14 We are not persuaded, however, that the circuit court relied on the inaccurate information to Schwan's detriment. The court explicitly stated at the postconviction hearing that it had considered the hit-and-run charge only in the context of whether there was another sentence that needed to be harmonized in terms of imposing consecutive or concurrent time, and that the sentence in this case would not have been any different "even without the minor error as to which sentence the defendant might" be or have been revoked on. The court's decision to make the sentence concurrent was in Schwan's favor.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

